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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

THE B. F. GOODRICH COMPANY,
Petitioner,

v.

NORTHWEST INDUSTRIES, INC. and
INTERSTATE COMMERCE COMMISSION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR RESPONDENT NORTHWEST INDUSTRIES, INC. IN OPPOSITION

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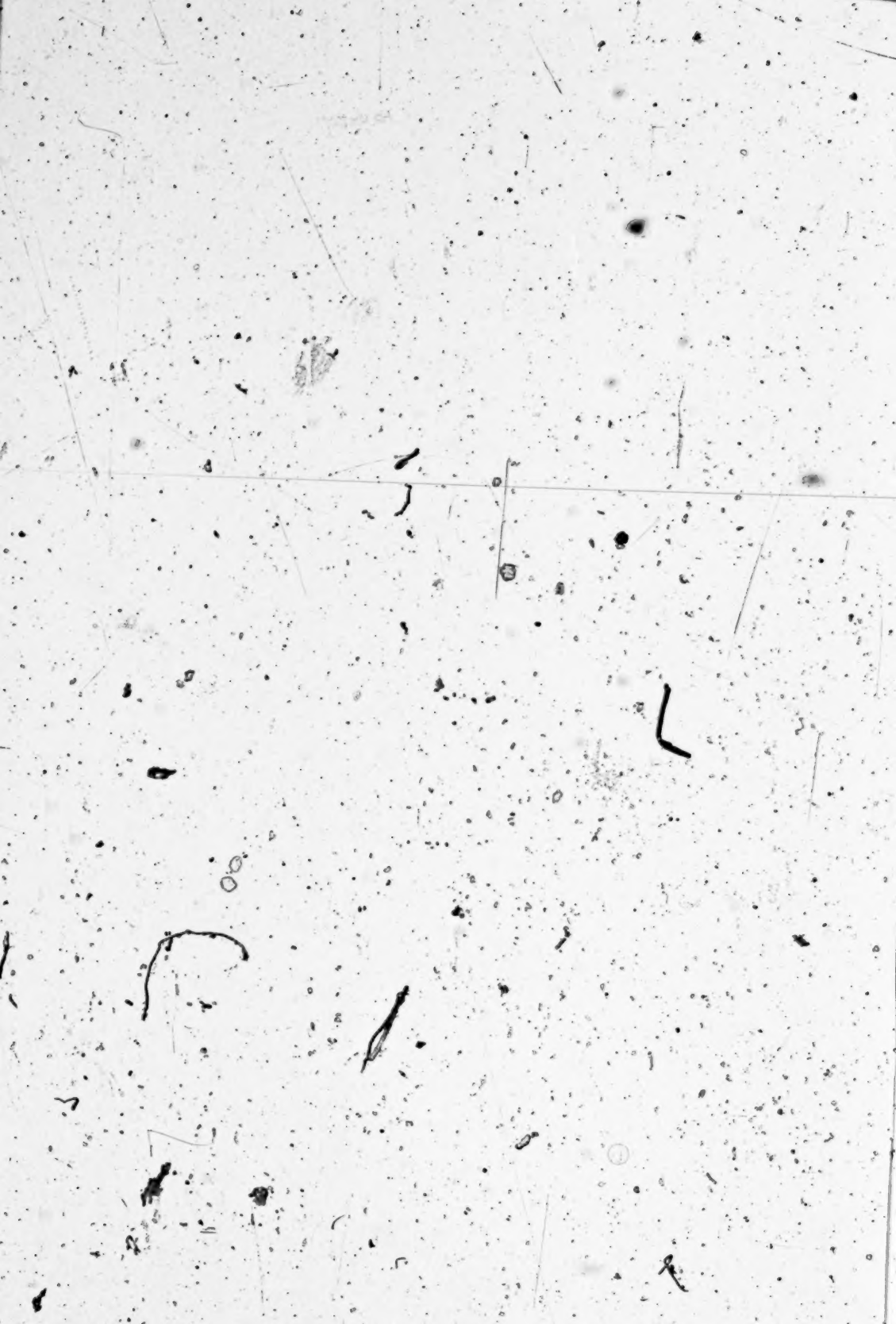

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
ARGUMENT	5
CONCLUSION	11

CITATIONS

B. F. Goodrich Company v. *Northwest Industries*, S.D.N.Y., C.A. 69-109	7
Chicago & N. W. Ry. Co.—Merger, 333 I.C.C. 236 (1968)	5
Chicago South Shore & South Bend R. v. *Monon Railroad*, 235 F. Supp. 984 (N.D. Ill. 1964)	9
Clemens v. *Central Railroad Company of New Jersey*, 264 F. Supp. 551 (E.D. Pa. 1967), *rev'd on other grounds*, 399 F. 2d 825 (3d Cir. 1968), *cert. denied* 393 U.S. 1023 (1969)	9
Most v. *Alleghany Corporation*, —— F. Supp. —— (S.D.N.Y. 1970)	9
Neisloss v. *Bush*, 293 F. 2d 873 (D.C. Cir. 1961)	9
Penn-Central Merger and N&W Inclusion Cases, 389 U.S. 486 (1968)	8
Schwabacher v. *United States*, 334 U.S. 182 (1948)	8

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BRIEF FOR RESPONDENT NORTHWEST INDUSTRIES, INC. IN OPPOSITION

QUESTIONS PRESENTED

Whether the federal courts should entertain a complaint requesting an injunction against an alleged violation of Section 5 of the Interstate Commerce Act when complainant previously raised the identical issues before the Interstate Commerce Commission, received an adverse determination, and failed to appeal the Commission's order.

Whether a private party's complaint, charging a violation of Section 5 of the Interstate Commerce Act, states a federal cause of action for injunctive relief.

STATUTE INVOLVED

Pertinent paragraphs of Section 5 of the Interstate Commerce Act (49 U.S.C. § 5) provide in part:

> (2)-(a) It shall be lawful, with the approval and authorization of the Commission, . . . for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise . . . .
>
> (c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.
>
> (4) It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, ...
>
> (7) The Commission is hereby authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (4). If the Commission finds after such investigation that such person is violating the provisions of such paragraph, it shall by order require such person to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation. . . .
>
> (8) The district courts of the United States shall have jurisdiction upon the complaint of the Commission, alleging a violation of any of the provisions of this section or disobedience of any order issued by

> the Commission thereunder by any person, to issue such writs of injunction or other proper process, mandatory or otherwise, as may be necessary to restrain such person from violation of such provision or to compel obedience to such order.
>
> (11) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power . . . to carry such transaction into effect . . . and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved. . . .

STATEMENT OF THE CASE

In January 1969 respondent Industries * announced an offer to exchange certain of its securities for petitioner Goodrich's stock. Goodrich's management, pursuing "a wide array of tactics in attempting to block [Industries] from making the offer" (R. 28a),** sought to interpose the Interstate Commerce Act, and procedures of the Interstate Commerce Commission, between Industries' offer and its consideration by Goodrich's stockholders. Initially, Goodrich urged that the Commission require Industries to submit for Commission approval under Section 20a of

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* Parties are here given the same shortened names used by Goodrich in its petition and by the two lower courts in their opinions.

** "R." refers to the record filed in this Court; "Pet." refers to the Goodrich petition whose appendices include both lower court opinions.

the Act the securities offered to Goodrich stockholders (R. 72a-82a).

As a second blocking effort, in March 1969, Goodrich acquired all the stock of Motor Freight, a motor carrier subject to the Commission's jurisdiction. Three days later, it filed a petition with the Commission urging that, since Goodrich now had control of a motor carrier and Industries already had control of a rail carrier, Industries' acquisition of control of Goodrich would combine two carriers in violation of Section 5 of the Interstate Commerce Act, absent the Commission's prior authorization (R. 83a-88a). Goodrich prayed that the Commission "initiate a proceeding to determine whether it should issue an order to prevent violation of the statute" (R. 86a), a move patently designed to lead to "possible hearings and protracted litigation" (R. 27a).

Industries responded to the Goodrich petition that, simultaneouly with any acquisition of control of Goodrich, it would either dispose of the carrier or deposit its stock with an independent voting trustee (R. 95a-97a). Industries laid before the Commission a draft agreement (R. 100a-110a) which (1) assigned to the trustee all authority and power Industries might otherwise acquire with respect to Motor Freight upon acquisition of control of Goodrich and (2) provided a permanent voting trust arrangement upon terms and conditions such as have been repeatedly approved by the Commission. Goodrich extensively criticized the proposed agreement (R. 234a-237a).

The Commission's order declined either to investigate the alleged prospective violation of Section 5 of the Interstate Commerce Act, or to declare that Industries' acquiring control of Goodrich would violate the Act (R. 8a-10a). The order's recital clauses noted both Industries' undertaking to deposit its stock with an independent voting trustee and that such agreements had been held effective to prevent control. The order also refused to

reopen the prior proceeding in which the Commission had determined not to compel Industries to obtain approval of its security issuances under Section 20a. See *Chicago & N. W. Ry. Co.—Merger*, 333 I.C.C. 236, 239-241 (1968).

Goodrich did not appeal this Commission order. Instead, it filed its complaint against Industries in the District Court of Delaware, alleging the same facts respecting its motor carrier acquisition and the same violation of Section 5 of the Interstate Commerce Act which it had previously put before the Commission. The Commission intervened and moved to dismiss. The District Court granted the dismissal, holding that the Court lacked subject matter jurisdiction of the complaint, that, even assuming such jurisdiction, the Court should decline it in view of the primary jurisdiction of the Commission, and that, finally, the total circumstances surrounding the litigation did not warrant issuance of an injunction.

The Court of Appeals for the Third Circuit unanimously affirmed, believing that the complaint was an impermissible collateral attack upon the Commission's order. It also agreed with the District Court that Section 5 of the Interstate Commerce Act does not permit a private action for its enforcement. It found it unnecessary to decide whether the doctrine of primary jurisdiction would also require the same result.

ARGUMENT

1. The only question which Goodrich suggests merits review—whether Section 5 of the Interstate Commerce Act permits a private action for injunctive relief—would probably not be reached should review be granted. There are other routine and compelling grounds for sustaining the action of the lower courts in dismissing the complaint.

Here, Goodrich has been to the Commission with the identical allegations, eventuating in a final order of the Commission declining the relief sought. The Court of Appeals' initial and principal holding was that, Goodrich having failed to appeal the Commission's order, its complaint constituted an impermissible collateral attack upon that order. (Pet., pp. A10-A14). It did not disagree with, but did not reach, the District Court's view that the doctrine of primary jurisdiction would clearly prevent its taking action in any event (Pet., pp. A31-A33). Both of these well-settled principles are clearly applicable, provide independent grounds for affirming the dismissal of Goodrich's complaint apart from the question sought to be reviewed, and do not warrant any exposition by this Court in the framework of this case.

There is no merit in the arguments Goodrich adduces to escape their application. Goorich's claim is that the Commission order is unclear to the point that it might be viewed as a mere "abstract declaration," and hence not appealable. The short answer given by the Court of Appeals was that the "Commission's order . . . determined the right of Industries to proceed with its acquisition of Goodrich, and it denied Goodrich the opportunity to contest this issue . . . ." (Pet., p. A13). Moreover, the Commission order is a full and explicit denial of everything which Goodrich requested in its pleadings before the Commission. If the denial did not result in an appealable order, it would be only because of Goodrich's inept pleading and failure to exhaust its administrative remedies. Clearly, under the provisions of Section 5(7), Goodrich could have filed a formal complaint whose denial or dismissal would have eliminated any possible question of appealability.

2. Goodrich urges that its case presents "serious and recurring problems" (Pet., p. 9), and that "as tender offers become increasingly common and thus more difficult to police, target corporations should not be left to

the questionable mercy of regulatory agencies which are at times overburdened with other tasks or insensitive to the necessity of compelling compliance with the statute which they are charged with administering." (Pet., p. 10).

Against the present factual background, it is singularly inappropriate for Goodrich to suggest that the Commission might have been "insensitive" to its important tasks. To the contrary, the Commission might well have been sensitive to the possibility that its processes were being misused in a contest having nothing to do with transportation and which should be settled in the market place. Transparently, Goodrich management here sought to contrive an Interstate Commerce Act problem, and thus to deny its stockholders an opportunity even to consider a tender offer which other federal statutes assured would be fairly made. The sequence of events—tender offer by Industries in January, acquisition by Goodrich of a motor carrier on March 4, and petition to so advise the Commission by Goodrich on March 7—justifies what the District Judge referred to as "suspicion in one's mind" that the affair was a "maneuver concocted by executives or more likely lawyers" (R. 179a).*

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* Depositions in another litigation arising out of the tender offer confirm the "suspicion." Goodrich hastened to acquire a motor carrier upon the advice of its counsel; the motor carrier was acquired after assurance that it was competitive with the railroad controlled by Industries. See deposition of Goodrich's chief executive officer in *B. F. Goodrich Company* v. *Northwest Industries*, S.D.N.Y., C.A. 69-409, which included the following:

"Q. Did you report to the board of directors the recommendation of Mr. Hartfield of White & Case and of Mr. Cox of the Covington firm, that your company acquire a trucking line?

A. . . . I am sure we told the board that this was recommended by White & Case and by Mr. Cox. . . .

Q. Did your board of directors, in considering the acquisition of The Motor Freight Corporation, discuss or consider the extent to which the routes serviced by that trucking line were competitive with areas serviced by the railroad facilities of Northwest Industries?

A. There was a route map present which was passed around . . ."

The case provides its own persuasive illustration why enforcement of Section 5 should be left to the Commission. Assuming *arguendo* that Industries' acquisition of control of Goodrich would violate Section 5, the resulting violation would be sterile, technical, ephemeral, and unworthy of detailed Commission attention. The Commission might well have considered that such a violation paled in comparison with the palpable misuse of its processes which Goodrich sought. The Commission certainly does not sit to ensure the tenure in office of a rubber company's management, or to prevent consideration of a tender offer by a rubber company's shareholders. The Commission should be left free to make a practical judgment on the need to enforce and the method of enforcing Section 5; it should not have enforcement partially lifted out of its hands and reposed in private litigants.

3. The Court of Appeals correctly noted that permitting a private cause of action for injunctive relief for an alleged violation of Section 5 "would be at war with the statutory scheme vesting responsibility for the operation of common carriers with the Commission" (Pet., p. A15). This Court has frequently remarked upon the comprehensive nature of Section 5, devised by Congress to encourage carrier consolidation, and the very wide discretionary powers entrusted thereunder to the Commission. See, *e.g.*, *Schwabacher* v. *United States*, 334 U.S. 182 (1948); *Penn-Central Merger and N&W Inclusion Cases*, 389 U.S. 486 (1968). The specific language of the Section, as well as its overriding purpose, makes very clear the Commission's supremacy in the area, and that the happenstance of private litigation must not in any way impede or intrude upon the Commission's exercise of its important responsibilities.

Paragraph (11) of the Section provides that the jurisdiction of the Commission shall be "exclusive and plenary," and that the Commission's approval of a consolidation provides both antitrust immunity and relief from

"all other restraints, limitations, and prohibitions of law, Federal, State, or municipal." Paragraph (7) empowers the Commission to institute an investigation of possible violations, upon its own motion or upon complaint, and to order such action as may be necessary, in the Commission's opinion, to terminate any violation it finds. To put beyond any doubt what is otherwise clear, Paragraph (8) confers upon the District Courts jurisdiction over alleged violations only "*upon the complaint of the Commission*" (emphasis added).

The only other Court of Appeals which has confronted the problem has been as emphatic as the Court below in rejecting the view that Section 5 either needs or tolerates a private action for its enforcement. *Neisloss'* v. *Bush*, 293 F. 2d 873 (D.C. Cir. 1961), involved a complaint charging that the Commission had wrongfully declined to investigate alleged violations of Section 5. Mr. Justice Reed, sitting by special designation, said that there "is nothing in the statute or its history to indicate that Congress, in enacting § 5 (2), meant to authorize an original action in the district court, and that it took the extraordinary step of bypassing its expert agency in the matters here involved" (p. 878). He continued that the matters involved "call for the exercise of discretion and the practical application of the Commerce Act" and cited with approval an earlier Supreme Court statement that the "prescription of the statute is a standard for the Commission to apply and, independently of Commission action, creates no right which courts may enforce" (*Ibid.*). At least two district courts have reached the same conclusion. *Chicago South Shore & South Bend R.* v. *Monon Railroad*, 235 F. Supp. 984 (N.D. Ill. 1964); *Clemens* v. *Central Railroad Company of New Jersey*, 264 F. Supp. 551 (E.D. Pa. 1967), *rev'd on other grounds*, 399 F. 2d 825 (3d Cir. 1968), *cert. denied*, 393 U.S. 1023 (1969).

Most v. *Alleghany Corporation* —— F. Supp. —— (S.D.N.Y. 1970), which is Petitioner's principal reliance,

is distinguishable as neither involving a collateral attack on a prior Commission decision, nor presenting any factual questions of "control," such as the Court of Appeals recognized to be here present (Pet., pp. A17-A18). To the extent that the *Most* decision countenances a private action under Section 5, its authority is dubious, particularly so since it reached its decision without benefit of Commission participation, failed to meet the arguments persuasive to all other courts, and even failed to notice the *Neisloss* decision on that by the District Court below. One out-of-step district court decision, clouded as it is by the considerations given above, does not present grounds for review by this Court.

4. The case otherwise does not arise in such a posture as warrants the attention of this Court. The District Court denied relief at a time when the tender offer of Industries was still outstanding. That offer expired prior to the appeal to the Court of Appeals. Industries then and now, holds less than 17% of the voting stock of Goodrich. Industries herein repeats its advice to the Court of Appeals (1) that it has no present plan or intention to resume efforts to acquire control of Goodrich, (2) that it might, in the immediate or far future, feel compelled to make a further effort to acquire control, and (3) that it, therefore, declines to urge mootness since it wishes to give no hostages to the future.

It is, nevertheless, clear that the case involves no present controversy and no immediate practical problems. The complaint seeks injunctive relief against action which may never be attempted. Should Industries renew an effort to acquire control of Goodrich, whether Goodrich is entitled to injunctive relief may hinge on the manner in which such control is sought or on other equitable considerations which cannot now be foreseen. This Court's restricted time should not be given to private litigations which have no immediacy.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1970

THE B. F. GOODRICH COMPANY, PETITIONER

v.

NORTHWEST TRUCKERS, INC. AND
INTERSTATE COMMERCE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

BRIEF FOR THE
INTERSTATE COMMERCE COMMISSION
IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 216

THE B. F. GOODRICH COMPANY, PETITIONER

v.

NORTHWEST INDUSTRIES, INC. AND
INTERSTATE COMMERCE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A6-A19) is not yet reported. The opinion of the district court (Pet. App. A21-A35) is reported at 303 F. Supp. 53. The order of the Interstate Commerce Commission is unreported, and appears as an Appendix to this brief.

JURISDICTION

The judgment of the court of appeals was entered on April 14, 1970, and the petition for a writ of certorari was filed on June 2, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Section 5 of the Interstate Commerce Act is enforceable by private suit.

2. Whether the instant private action, brought before a single district judge, is an impermissible collateral attack upon an order of the Interstate Commerce Commission, which order is reviewable only by suit against the United States in a three-judge court.

STATEMENT

This litigation involves an attempt by petitioner ("Goodrich") to avert its takeover by respondent Northwest Industries, Inc. ("Industries"). The relevant facts are that Industries, a holding company controlling certain railroads, announced a tender offer for all Goodrich stock in January 1969 (Pet. App. A7, A22). Petitioner then sought to prevent the acquisition by requesting the Interstate Commerce Commission to reopen a proceeding involving Industries' control of the railroads,[1] so as to require ICC approval for securities that Industries would issue to acquire Goodrich (Pet. App. A7-A8, A28).

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[1] *Chicago & N.W. Ry. Co.—Merger—Chicago and Great Western Ry. Co.*, 333 I.C.C. 236 (1968).

In March 1969, Goodrich purchased a motor carrier, thereby creating the likelihood that Industries' control of Goodrich would violate Section 5 of the Interstate Commerce Act (49 U.S.C. 5) because it would thereby acquire control of another carrier without Commission approval (Pet. App. A8, A29). Stressing this Section 5 question, Goodrich renewed its request that the prior Industries' proceeding be reopened for imposition of securities regulation, and, in the alternative, asked the Commission to investigate the contemplated Industries-Goodrich merger to determine whether the agency should enter an order to prevent a Section 5 violation (Pet. App. A8, A28-A30).

In reply, Industries stated that, if it obtained control of Goodrich, it would sell the motor carrier Goodrich had acquired to a non-affiliated non-carrier or, pending such a sale, would place the motor carrier stock in an independent voting trust (Pet. App. A9, A30). After receiving a draft trust agreement from Industries and arguments from Goodrich, the Commission issued an order dated April 24, 1969 (Appendix, *infra*, p. 11), which reopened the proceeding for the purpose of subjecting Industries to Section 20(5) of the Act, but denied relief "in all other respects" (Appendix, *infra*, p. 13). It based this denial in part on its findings that

> * * * on March 4, 1969, B. F. Goodrich Company acquired control of Motor Freight Corporation, an interstate motor carrier, through acquisition of all the latter's common stock, that

> Northwest Industries, Inc., has stated that simultaneously with acquisition of control of B. F. Goodrich Company the stock of Motor Freight Corporation will be sold to a non-affiliated noncarrier, or, pending sale, complete control of such motor carrier will be placed in an independent voting trustee, [and] that the Commission has held in the past that the placing of stock in an independent voting trust, with necessary restrictions, constitutes divestiture of control thereof, see *Missouri Pacific Railroad Company—Control—Chicago & Eastern Illinois Railroad Company, et al.*, 327 I.C.C. 279 * * *. [Appendix, *infra*, pp. 12-13.]

Goodrich never sought judicial review of this Commission order.

On July 25, 1969, while the tender offer was open (Pet. App. A22), Goodrich filed the instant suit against Industries seeking a declaratory judgment that the acquisition would be unlawful under Section 5, and an injunction barring it until Commission approval was granted. The Interstate Commerce Commission was allowed to intervene and successfully moved to dismiss (Pet. App. A9-A10, A21-A35). The court of appeals affirmed on the ground that this litigation was an improper collateral attack upon the Commission order (Pet. App. A10-A14). In the alternative, the court held that an assumed violation of Section 5 of the Interstate Commerce Act would not give rise to a private claim on which relief could be granted (Pet. App. A14-A18).

Meanwhile, the tender offer had expired in August 1969 (R. 52a), with Industries having acquired over 16 percent of Goodrich's stock. *New York Times*, Au-

gust 16, 1969, pp. 35, 39. In its brief below, Industries stated that it had no present intention to renew the effort, but reserved the right to do so at any future time.[2]

ARGUMENT

The decision below is correct and no issue warranting plenary review is presented.

1. The court of appeals correctly held that the complaint was in substance a collateral attack upon the Commission's order which could be asserted only against the United States before a statutory three-judge court convened under 28 U.S.C. 2321-2325. Before the Commission, as here, petitioner sought to halt the Industries takeover effort on the ground that Industries would thereby acquire a carrier without Commission approval, in violation of Section 5 of the Act (Pet. App. A8). The Section 5 claim was the heart of Goodrich's position in the Commission proceeding and in the instant litigation. As the court of appeals stated, "it is clear that the Commission dealt with the same contentions made by Goodrich in the District Court" (Pet. App. A10).

After the Commission had denied relief on these contentions, Goodrich was not free to circumvent the order and the normal channels of judicial review through subsequent resort to private litigation. By

[2] On May 21, 1969, the United States filed a complaint against Industries charging that the attempted takeover would violate Section 7 of the Clayton Act (15 U.S.C. 18). See *United States* v. *Northwest Industries, Inc.*, 301 F. Supp. 1066 (N.D. Ill.). Discovery proceedings are still going forward.

seeking to enjoin the acquisition as a violation of Section 5, petitioner is plainly asking the courts to correct the Commission's decision not to act in this regard when the matter was before it. That request can be asserted only before a statutory three-judge court reviewing the Commission order, not in an independent suit brought before a single district judge. *Venner* v. *Michigan Central R. R. Co.*, 271 U.S. 127; *Lambert Run Coal Co.* v. *Baltimore & Ohio R. R. Co.*, 258 U.S. 377; *Tampa Phosphate R. Co.* v. *Seaboard Coast Line R. Co.*, 418 F. 2d 387 (C.A. 5), certiorari denied, 397 U.S. 910; *Suffin* v. *Pennsylvania R. Co.*, 396 F. 2d 75, 76 (C.A. 3), certiorari denied, 393 U.S. 1062; *Simpson* v. *South Western R. Co.*, 231 F. 2d 59, 62-66 (C.A. 5), certiorari denied, 352 U.S. 828; *Schwartz* v. *Bowman*, 244 F. Supp. 51, 68 (S.D. N.Y.), affirmed *sub nom. Annenberg* v. *Allegheny Corp.*, 360 F. 2d 211 (C.A. 2), certiorari denied, 385 U.S. 921.

There is no merit to petitioner's contention that the Commission's order was in fact unreviewable (Pet. 9, 11). Though negative in form, it had a direct and immediate impact upon the rights of the parties because it allowed Industries to pursue its attempted acquisition of Goodrich notwithstanding Goodrich's allegations that the acquisition would violate Section 5. Under such cases as *City of Chicago* v. *United States*, 396 U.S. 162, *Frozen Food Express Co.* v. *United States*, 351 U.S. 40, *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 142-143, and the well-established presumption of reviewability (*City of Chicago*, *supra*, 396 U.S. at 164; *Abbott*

Laboratories v. *Gardner*, 387 U.S. 136, 140), it was plainly a reviewable order. Cf. *Tampa Phosphate R. Co.* v. *Seaboard Coast Line R. Co.*, *supra*. Indeed, for these reasons, the Commission repeatedly conceded reviewability.

2. The court of appeals properly held that there is no private cause of action for violation of Section 5 of the Interstate Commerce Act (Pet. App. A14-A18). The statute authorizes no such suits either expressly or by implication. Sections 5(7) and 5(8) explicitly empower the Commission, with court aid when necessary, to enforce the statute. The "authority conferred by" Section 5 is "exclusive and plenary" (49 U.S.C. 5(11)). And the absence of a provision authorizing private enforcement of Section 5 is particularly significant where Congress has already created private actions for violations of other sections of the Interstate Commerce Act.[3] Cf. *T.I.M.E., Inc.* v. *United States*, 359 U.S. 464. Moreover, approval of private suits—with Section 5 decisions being made by the courts—would necessarily restrict the Commission's present discretion to approve transactions in the public interest notwithstanding prior unauthorized control.[4] To transfer the administration of Sec-

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[3] *E.g.*, 49 U.S.C. 1(20), 8, 9, 20a(11), 322(b)(2). A private party may also bring an action to enforce a Commission order (28 U.S.C. 2321).

[4] *Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115, 129-130; *Interstate Investors, Inc.* v. *United States*, 287 F. Supp. 374, 389 (S.D.N.Y.), affirmed *per curiam*, 393 U.S. 479; *Illinois Central R. Co.* v. *United States*, 263 F. Supp. 421, 425-430 (N.D. Ill.), affirmed *per curiam*, 385 U.S. 457.